No. 92-1911

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

PUD NO. 1 OF JEFFERSON COUNTY
AND THE CITY OF TACOMA,
Petitioners,
v.
STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,
DEPARTMENT OF FISHERIES,
AND DEPARTMENT OF WILDLIFE,
Respondents.

On Writ of Certiorari to the Supreme Court of Washington

BRIEF OF *AMICUS CURIAE* NIAGARA MOHAWK POWER CORPORATION IN SUPPORT OF THE PETITIONERS

Of Counsel:

PAUL J. KALETA
BRIAN K. BILLINSON
NIAGARA MOHAWK POWER CORPORATION
300 Erie Boulevard West
Syracuse, New York 13202
(315) 428-6187

TIMOTHY P. SHEEHAN
HISCOCK & BARCLAY
One KeyCorp Plaza, Suite 1100
30 South Pearl Street
Albany, New York 12207
(518) 434-2163

EDWARD BERLIN
Counsel of Record
KENNETH G. JAFFE
JOEL DEJESUS
SWIDLER & BERLIN, CHARTERED
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7500

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether Congress intended in section 401 of the Federal Water Pollution Control Act ("CWA") to authorize states to condition water quality certifications for federally licensed projects on provisions of state laws that were not promulgated as water quality standards under section 303 of the CWA and do not regulate the discharge of pollutants into navigable waters?

2. Whether Congress intended to permit states to utilize section 401 of the CWA to override the comprehensive and exclusive authority to balance the developmental, environmental and other aspects of hydroelectric development reserved by the Federal Power Act ("FPA") to the Federal Energy Regulatory Commission?

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1911

PUD NO. 1 OF JEFFERSON COUNTY
AND THE CITY OF TACOMA,
Petitioners,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,
DEPARTMENT OF FISHERIES,
AND DEPARTMENT OF WILDLIFE,
Respondents.

On Writ of Certiorari to the Supreme Court of Washington

BRIEF OF *AMICUS CURIAE* NIAGARA MOHAWK POWER CORPORATION IN SUPPORT OF THE PETITIONERS

INTEREST OF *AMICUS CURIAE*

Niagara Mohawk Power Corporation ("Niagara") is a public utility that provides electric service to more than 1.5 million customers living or working within a 24,000 square mile area of New York State. In order to provide electricity to its customers at the lowest possible cost, Niagara maintains a diverse mix of generating units, utilizing a variety of different fuels to produce electricity. Niagara derives approximately 10 percent of its requirements of electric capacity and energy from 73 hydroelectric facilities that are subject to the licensing provi-

sions of Part I of the Federal Power Act. These hydroelectric facilities provide over 700 megawatts of capacity and constitute the lowest cost component of Niagara's energy resource mix. Niagara owns and operates more hydroelectric facilities subject to the FPA's hydroelectric licensing provisions than any other licensee.

Niagara's interests as a licensee under the FPA and the interests of its customers in preserving access to economical hydroelectric resources are directly and vitally affected by the instant case. Nine licenses issued by the Federal Energy Regulatory Commission ("FERC") or its predecessor, the Federal Power Commission ("FPC"), covering thirty of Niagara's hydroelectric developments, are due to expire on December 31, 1993. Niagara has filed applications with the FERC for new licenses for those projects and for initial licenses for other hydroelectric projects. In connection with those applications, Niagara has also applied to the New York State Department of Environmental Conservation ("NYSDEC") for certifications required by section 401 of the CWA, 33 U.S.C. § 1341. In addition, Niagara is regularly required by the FERC to undertake dam repair or reconstruction projects, some of which may also require state certification under section 401.

The NYSDEC has taken a view of its authority under section 401 that is as broad as that asserted by the Washington Department of Ecology ("WDEC") and upheld by the court below. The NYSDEC has asserted that it has authority under section 401 to subject Niagara's federally licensed hydroelectric projects to numerous provisions of New York law, even though it concedes that, by virtue of the FPA, it cannot require Niagara to apply for the state permits required by those state statutes.[1]

[1] Declaratory Ruling 15-09, *stated in* Letter from Marc S. Gerstman, Deputy Commissioner and General Counsel of NYSDEC, to Brian K. Billinson, Senior Counsel of Niagara Mohawk (Aug. 27, 1990).

The NYSDEC has denied Niagara's applications for certification for the hydroelectric projects being relicensed, on the ground that Niagara's applications did not include sufficient information relevant to the application of the substantive requirements of state permitting statutes to those projects.[2]

The NYSDEC's sweeping view of its authority under section 401, if upheld, would subject Niagara to the requirements of state environmental regulatory schemes that duplicate and potentially conflict with the regulation of Niagara's hydroelectric facilities by the FERC. The result would be to delay implementation and increase the cost of dam maintenance and repair work required by the FERC. In addition, the cost of producing electricity from Niagara's hydroelectric projects (which costs are reflected in Niagara's rates to its customers) could be increased substantially, severely undermining the economic viability of these important resources.

Niagara has sought administrative review of the NYSDEC's denial of its applications for certification in connection with the projects being relicensed and has challenged the agency's interpretation of the scope of its authority in state court. The New York Court of Appeals recently struck down the NYSDEC's view of its authority as contrary to section 401.[3]

STATUTORY FRAMEWORK

A. Regulation under the Clean Water Act

1. Effluent restrictions promulgated by EPA. In the CWA, Congress enacted a comprehensive program for

[2] Letter from J. J. Sama, NYSDEC, to J. M. Audenson, Niagara Mohawk, re: Request for Water Quality Certification (Nov. 19, 1992).

[3] *Niagara Mohawk Power Corp. v. New York State Dep't of Environ. Conservation*, No. 214 (N.Y. Nov. 11, 1993).

the control and abatement of water pollution that "anticipates a partnership between the States and the Federal Government . . . ." *Arkansas v. Oklahoma*, 112 S. Ct. 1046, 1054 (1992). The United States Environmental Protection Agency ("EPA") is directed to promulgate effluent restrictions applicable to different categories of sources of water pollution. These restrictions include effluent limitations restricting the discharge of pollutants under Sections 301 and 302 of the CWA, 33 U.S.C. §§ 1311, 1312; standards of performance applicable to the discharge of pollutants from new sources of water pollution under Section 306, 33 U.S.C. § 1316; and toxic and pretreatment effluent standards under Section 307, 33 U.S.C. § 1317.

2. *Water quality standards promulgated by states, subject to EPA review.* The CWA also defines a role for the states in controlling water pollution. In order to supplement the effluent restrictions established by EPA, section 303 authorizes the states to establish "water quality standards," consisting of "the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." 33 U.S.C. § 1313(c)(2). Water quality standards promulgated by the state must be reviewed and approved by EPA before they can take effect.[4] EPA has issued regulations to implement its review of state water quality standards. 40 C.F.R. Part 131 (1992). Under those regulations, the "water quality criteria" specified in the state water quality standards must be "sufficient to protect the designated uses." 40 C.F.R. § 131.6(c) (1992). The regulations further provide that, "When the [water quality] criteria are met, water quality will generally protect the designated use." 40 C.F.R. § 131.3(b) (1992).

---

[4] 33 U.S.C. § 1313(c)(3). If a State does not enact water quality standards that meet EPA's requirements, EPA may promulgate water quality standards for the State. 33 U.S.C. § 1313(c).

3. *The certification requirement for federally licensed projects.* Under section 401 of the CWA, an applicant for a federal license or permit authorizing an activity that may result in a discharge into navigable waters, must provide "a certification from the State in which the discharge originates or will originate . . . that any such discharge will comply with the applicable provisions of [Sections 301, 302, 303, 306 and 307 of the CWA]." 33 U.S.C. § 1341(a)(1). The state must act on a request for certification within a reasonable time of receipt (not to exceed one year), but if the state denies the certification within that time, the federal agency may not issue the license or permit. Section 401(d) also directs that a certification contain "effluent limitations, other limitations and monitoring requirements" necessary to ensure compliance with any applicable effluent restrictions promulgated by EPA under Sections 301, 302, 306, or 307 of the CWA and with "any other appropriate requirement of State law." 33 U.S.C. § 1341(d). Any limitations and monitoring requirements imposed by the state under section 401(d) become conditions on the federal license or permit. *Id.*

B. Regulation under the Federal Power Act

Virtually all of Niagara's hydroelectric projects are subject to regulation under Part I of the FPA, which vests in the FERC comprehensive authority over the construction, operation, and maintenance of hydroelectric facilities located on the navigable waters of the United States. *See* 16 U.S.C. §§ 797(e), 817(1). In discharging this broad authority, the FERC is required to evaluate a wide range of often competing values to promote and protect the public interest in "the comprehensive development of national resources." *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 181 (1946).

The FERC is directed to condition any hydroelectric license to ensure that the project is "best adapted to a

comprehensive plan for the adequate protection, mitigation and enhancement of fish and wildlife (including related spawning grounds and habitat) and for other beneficial public uses." 16 U.S.C. § 803(a)(1). The FERC must give such non-developmental interests "equal consideration" in licensing decisions. 16 U.S.C. § 797(e).

Section 10(j) of the FPA requires the FERC to solicit the recommendation of all interested state and federal agencies regarding the conditions to be included in a project's license, and to base the conditions that the FERC will impose on its licenses, pursuant to 16 U.S.C. § 803 (a)(3), on its consideration of those recommendations.[5] The FERC, however, retains ultimate authority to determine if, and under what conditions, a license will be issued. *California v. FERC*, 495 U.S. 490, 499 (1990).[6]

[5] 16 U.S.C. § 803(j). The FERC's licensing regulations require applicants for initial or renewed hydroelectric licenses to consult with interested state and federal agencies, to provide those agencies with extensive information regarding a project's potential impact on the environment and the applicant's plans to mitigate those effects and to enhance natural resources, and to hold public meetings jointly with those agencies. 18 C.F.R. §§ 4.38(b) (1993) (pertaining to initial licenses), 16.8(b) (1993) (pertaining to relicenses). An applicant must also conduct, prior to filing its application, all reasonable studies requested by state and federal resource agencies that are necessary for the FERC to make an informed decision on the merits of the application, including studies relating to environmental impacts and mitigation measures. 18 C.F.R. §§ 4.38(c), 16.8(c) (1993). The application itself must include extensive reports and information compiled in consultation with resource agencies addressing numerous environmental issues, including the project's impacts on water quality, fish, wildlife, botanical resources, archeological resources, aesthetics, recreational and scenic values, and wetlands. 18 C.F.R. §§ 4.41(f), 4.51(f) (1993).

[6] The FERC maintains continuing regulatory authority after a project is licensed to police compliance with license conditions and to address such issues as dam safety, maintenance and repair. Under the FERC's dam safety regulations, for example, a regional engineer (or other authorized agent of the FERC) subjects hydroelectric projects to inspections for purposes of protecting the safety, stability and integrity of the project or otherwise protecting life, health or property. 18 C.F.R. § 12.4 (1993). As a result of these inspections, the FERC can "require an applicant or licensee to take any other action with respect to the design, construction, operation, maintenance, repair, use, or modification of the project . . . that is in the judgment of the regional engineer . . . necessary or desirable." *Id.*

SUMMARY OF ARGUMENT

The court below held that the "appropriate requirement of state law" clause in section 401(d) of the Clean Water Act "is a congressional authorization to the states to consider all state action related to water quality in imposing conditions on section 401 certificates." Pet. App. 13a. On this basis, the court allowed the WDEC to impose conditions related to streamflow quantities for fish habitat. The expansive reading of state authority under section 401 adopted by the court below is contrary to the language and structure of the CWA and fails to give effect to Congress's determination that the FERC should exercise comprehensive authority over hydroelectric projects to promote the balanced development of water resources.

First, the language and structure of section 401 demonstrate that only a state law that regulates "discharges," used in the CWA to mean the addition of pollutants to navigable waters, constitutes an "appropriate requirement of state law" for the purposes of section 401(d). By its express terms, section 401 requires state certification only for federally licensed activities that may result in a discharge. Moreover, the specific provisions of the CWA enumerated in section 401(a)(1) as the bases for the exercise of the states' certification authority all regulate discharges of pollutants into navigable waters. There is no reason to read the states' authority to condition certifications, which is limited to those same provisions of the CWA and "appropriate" requirements of state law, so broadly as to override Congress's carefully crafted

limitations on the grounds upon which a certification may be denied.

To the contrary, in section 510 of the CWA, Congress expressly reserved the authority of the states to adopt and enforce standards or limitations "respecting discharges of pollutants" against preemption by the CWA. The "appropriate requirement" clause of section 401(d) serves a necessary and straightforward function by enabling a state to apply any discharge limitation it enacts by virtue of this reserved authority to federally licensed projects.

Second, the sweeping interpretation of section 401(d) adopted below ignores the comprehensive scheme of federal regulation of water power development established under the FPA. In the FPA, Congress gave the FERC exclusive and comprehensive authority to license hydroelectric projects, based on that agency's assessment of the appropriate balance among the developmental, environmental and other impacts and benefits of each project. As interpreted by the court below, section 401(d) would empower a state agency to supplant the role that Congress assigned to the FERC and to supersede FERC's balancing of all interests affected by a project, specifically including environmental interests. Indeed, under the decision below, state requirements touching in any way on water quality would not even be subject to the balancing mandated by the FPA. There is no indication that Congress intended in section 401 to empower state agencies to override the FERC's authority in this manner. The assumption of the court below to the contrary is belied by Congress's express reaffirmation of the paramount and preemptive authority of the FERC to balance all interests affected by hydroelectric projects *after* the enactment of section 401.

ARGUMENT

I. ONLY A STATE LAW THAT RESTRICTS THE DISCHARGE OF POLLUTANTS INTO NAVIGABLE WATERS CAN CONSTITUTE AN "APPROPRIATE REQUIREMENT OF STATE LAW" FOR PURPOSES OF SECTION 401.

The court below held that the state agency could impose streamflow conditions on its issuance of a certification under section 401, regardless of whether those conditions were necessary to assure compliance with a state-issued and EPA-approved water quality standard. Pet. App. 10a. The court found this authority to have been granted by the Congressional directive that any certification issued under section 401 set forth "any effluent limitations, and other limitations, and monitoring requirements" necessary to ensure compliance with limitations imposed under listed sections of the CWA, "and with any other appropriate requirement of State law." 33 U.S.C. § 1341(d). The court interpreted the last phrase to encompass "all state water-quality related statutes and rules, including, but not limited to, the water quality standards the state has adoped as required by section 303." Pet. App. 10a.

The Washington Supreme Court's expansive reading of state authority under section 401 is contrary to the plain meaning of the statute. The Washington Court's holding turned on the meaning of "appropriate," as used in section 401, but it interpreted that provision without reference to the language and structure of section 401 as a whole and the related operative provisions of the CWA. Had the court below properly focused on the language and structure of the statutory provision before it, it would have recognized that Congress intended a far narrower scope for the states' authority to condition section 401 certifications, and therefore federal licenses and permits.

A. The Language of Section 401(d) and the Structure of Section 401 Demonstrate That Only a State Law That Regulates the Addition of Pollutants to Navigable Waters Constitutes an "Appropriate Requirement of State Law."

In interpreting a federal statute, a court's task is to enforce the intent of Congress as expressed in the language of the statute. *See United States v. Ron Pair Enterprises, Inc.*, 498 U.S. 235, 241-42. (1989). Statutory interpretation must start with the text of the statute itself. *Estate of Cowart v. Nicklos Drilling Co.*, 112 S.Ct. 2589, 2594 (1992). "[W]hen a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished." *Id.* In determining whether Congress has spoken with clarity, the Court does not consider a word or phrase in isolation, but looks to the context in which it is used. "[T]he meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal v. United States*, 113 S.Ct. 1993, 1996 (1993). *See also United States National Bank of Oregon v. Independent Insurance Agents*, 113 S.Ct. 2173, 2182 (1993); *Smith v. United States*, 113 S.Ct. 2050, 2054 (1993). In this case, although the word "appropriate" is ambiguous when viewed in isolation, the context in which it is used in section 401 of the CWA makes Congress's meaning clear. *See Smith*, 113 S.Ct. at 2054.

1. *The context in which the "appropriate requirement" clause appears in section 401(d) makes it clear that the scope of the clause is limited to state restrictions on the discharge of water pollutants.*

By the express terms of section 401(d), the states' conditioning authority attaches only to a "certification provided under this section."[7] In identifying the provisions

[7] Section 401(d) provides:

> Any certification provided under this section shall set forth effluent limitations, other limitations and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations or other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification.

33 U.S.C. § 1341(d).

of state law that are "appropriate" as conditions imposed on section 401 certifications, the court below should have begun by considering when such certifications are required. Pursuant to section 401(a)(1), a certification is required only for federally licensed activities that "may result in any discharge into the navigable waters." 33 U.S.C. § 1341(a)(1). A "discharge" is defined in the CWA to include both the "discharge of a pollutant" or "the discharge of pollutants," which terms are in turn defined to mean the "addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) and (16).[8] Inasmuch as a certification is required under section 401 only for activities that may result in a "discharge," a requirement of state law may only be "appropriate" as a condition attached to a section 401 certification if it regulates "discharges," *i.e.*, the addition of pollutants to navigable waters by point sources.[9]

[8] A "pollutant" is defined in the CWA to mean "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6). A "point source" is defined as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

[9] The legislative history of section 401 emphasizes the restriction of the scope of that provision to "discharges." The Senate Report explains that section 401 substantially confirms existing law, amending it "to assure consistency with the bill's changed emphasis to . . . effluent limitations based on the elimination of any discharge of pollutants." S. Rep. No. 414, 92d Cong., 1st Sess. 69 (1971),

This natural reading of "appropriate" is consistent with the context in which the word appears in section 401(d). The "appropriate requirement of State law" clause follows a list of specific references to effluent restrictions imposed pursuant to four sections of the CWA. Each of those sections regulates discharges of pollutants, as that phrase is used in the CWA.[10] Under the principle of *ejusdem generis*, the "appropriate requirement" clause is most reasonably construed to extend only to provisions of state law that impose similar restrictions on the pollutants that may be discharged by point sources into navigable waters. *See Norfolk & Western Ry. Co. v. American Train Dispatchers Ass'n*, 111 S.Ct. 1156, 1163 (1991); *Arcadia v. Ohio Power Co.*, 111 S.Ct. 415, 422 (1990).

While the canon of *ejusdem generis* is not controlling when the context of a statute dictates a different conclusion, *Norfolk & Western*, 111 S.Ct. at 1163, the language and structure of section 401 support its application here. By referring to "appropriate" requirements of state law, Congress plainly intended to limit the scope of the states'

---

reprinted in 2 *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 93rd Cong., 1st Sess. 1487 (1973) [hereinafter "CWA Legislative History"]. *See also* H.R. Rep. No. 911, 92d Cong., 2d Sess. 121, *reprinted in* 1 CWA Legislative History at 808.

[10] Section 301 declares unlawful "the discharge of any pollutant" and requires the Administrator of EPA to establish "effluent limitations for point sources." 33 U.S.C. § 1311. Section 302 similarly empowers the Administrator to establish effluent limitations whenever "discharges of pollutants from a point source or group of point sources" would cause specified hazards. 33 U.S.C. §1312. Under section 306, the Administrator is directed to establish "standards of performance," which are defined as standards "for the control of the discharge of pollutants" from new sources. 33 U.S.C. § 1316. Finally, section 307 requires the Administrator to establish effluent limitations and pretreatment standards with respect to the discharge of toxic pollutants. 33 U.S.C. § 1317.

conditioning authority.[11] Reading the "appropriate requirement" clause to encompass "all state action related to water quality," as the lower court did (Pet. App. 13a) would place no effective limits on the states' conditioning authority. By the express terms of section 401(d), a requirement of state law can only be enforced in a water quality certification through "effluent limitations, other limitations and monitoring requirements." Virtually any state requirement that could be enforced through such means would bear some relationship to water quality. The lower court's interpretation thus gives no effect to the nature of "appropriate" as a modifier limiting the state requirements that could be enforced through a certification.[12]

2. The structure of section 401 supports giving a limited scope to the "appropriate requirements" clause of subsection (d).

Congress took pains in section 401 to define precisely the terms upon which a state could deny certification for a federally licensed or permitted project. Under section 401(a)(1), a state can deny certification only if a discharge from a federally licensed project will not comply with the applicable provisions of one of five listed sections of the CWA.[13] Four of the enumerated sections authorize

---

[11] *Cf. Mertens v. Hewitt Associates*, 113 S.Ct. 2063, 2069 (1993) (provision authorizing a court to award "such other equitable relief as the court deems appropriate'" does not extend to all relief historically available at equity).

[12] *See id.* at 2069 ("We will not read the statute to render the modifier superfluous."). *Compare Norfolk & Western*, 111 S.Ct. at 1163-64 (the phrase "all other law, including State and municipal law" cannot be limited by application of *ejusdem generis* because of the textual indicia that a broad sweep was intended).

[13] Section 401(a)(1) requires an applicant for a Federal license or permit authorizing an activity that may result in a discharge into navigable waters, to provide a State certification "that any such discharge will comply with the applicable provisions of sections [301, 302, 303, 306 and 307 of the CWA]." 33 U.S.C. § 1341(a)(1).

the Administrator of EPA to promulgate restrictions on discharges of pollutants by point sources. *See supra* n.10. The remaining provision, section 303, authorizes the states to promulgate water quality standards. Even those state-promulgated provisions require approval by EPA before they may take effect. 33 U.S.C. § 1313(c). Not only does section 401(a)(1) confirm the limitation of state authority under section 401 to the regulation of "discharges" from federally-licensed or permitted projects, it makes it clear that Congress gave the states the power to enforce only federally-promulgated or approved effluent restrictions and water quality standards against those projects.

Congress did not authorize the states in section 401(a)(1) to veto federal licenses or permits on the basis of other state requirements that were not presented to EPA for approval. Reading the "appropriate requirement" clause of section 401(d) to include all state laws touching on water quality would eviscerate the circumscribed limits of state authority under section 401(a)(1). Under the reading of section 401(d) adopted by the Washington Supreme Court, a state agency could impose onerous conditions on a certification that would be tantamount to vetoing a federal license or permit on grounds that do not regulate discharges of pollutants into navigable waters and that fall outside the state's water quality standards, the only legitimate basis for denying a certification under section 401(a)(1). *See Niagara Mohawk Power Corp.*, slip op. at 10.

In contrast, reading the "appropriate requirement" clause of section 401(d) to refer to state-promulgated restrictions on the addition of pollutants to navigable waters follows from the context in which the clause is used in section 401(d) and harmonizes the subparts of section 401. *Cf. Estate of Cowart*, 112 S.Ct. at 2595; *Freytag v. C.I.R.*, 111 S.Ct. 2631, 2638 (1991) A state may deny certification under section 401(a)(1) only for non-compliance with an applicable discharge-related requirement promulgated by EPA pursuant to one of the listed provisions of the CWA or with an applicable water quality standard promulgated by the state (and approved by EPA) under section 303. It may add effluent limitations and monitoring conditions to its certification pursuant to section 401(d) only as necessary to ensure compliance with those same requirements, or with provisions of state law that impose similar restrictions on the pollutants that may be discharged by point sources into navigable waters.

B. The "Appropriate Requirement" Clause Was Included in Section 401 To Subject Federally Licensed Projects to State Restrictions on Discharges of Water Pollutants.

The Congressional purpose in including the "appropriate requirement" clause in section 401(d) to authorize the states to condition section 401 certifications on compliance with state-promulgated restrictions on the discharge of pollutants may be readily discerned by reference to a related provision of the Act. Section 510 of the CWA provides that nothing "in this chapter," referring to the CWA, "shall preclude or deny the right of any State . . . to adopt or enforce . . . any standard or limitation respecting discharges of pollutants," provided that the state restriction is at least as stringent as any applicable federal requirements. 33 U.S.C. § 1370.

Section 510 reflects the desire of Congress not to restrict the states' flexibility to adopt more protective restrictions on the discharge of pollutants into navigable waters.[14] That section is not, however, sufficient in itself to permit the states to enforce uniformly any "standard or limitation respecting the discharge of pollutants." Although section 510 reserved the states' authority to set more stringent discharge restrictions against preemption

[14] *See* H.R. Rep. No. 911, 92 Cong., 2d Sess. 136, *reprinted in* 1 CWA Legislative History at 823.

by the CWA, it is silent with respect to other federal statutes. Congress evidently recognized that, in the absence of an express Congressional grant of authority, enforcement of any such state discharge limitation against a federally licensed project could be preempted by a comprehensive federal licensing statute, such as the FPA. *Cf. First Iowa*, 328 U.S. at 175, 181 (holding that although section 27 of the FPA "saved" certain state laws relating to property rights as to the use of water, the states' exemption from preemption was limited to that specific subject area).

Read in the context of the related provisions of the CWA, the "appropriate requirement" clause of section 401(d) serves a necessary and straightforward function. The clause was necessary to eliminate the immunity that federally-licensed projects could otherwise enjoy from state limitations "respecting discharges of pollutants" enacted pursuant to the authority reserved under section 510. The language and structure of section 401 afford no basis for reading the "appropriate requirement" clause to extend beyond state-enacted requirements "respecting discharges of pollutants" that are permissible under section 510.

C. The Court Below Disregarded the Language of Section 401 and Misread the Section's Legislative History.

1. *The court below ignored the complex regulatory scheme Congress crafted to achieve its objective.*

In adopting an expansive reading of the "appropriate requirement" clause, the Washington Supreme Court undertook no analysis of the language and structure of section 401. It looked instead to the general objective of the CWA, as stated in 33 U.S.C. § 1251(a), of "restor[ing] and maintain[ing] the . . . integrity of the Nation's waters." Pet. App. 11a. While the ultimate objective of a statute is appropriately taken into account in interpreting the language chosen by Congress, the court below failed to recognize that "vague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of its text regarding the *specific* issue under consideration." *Mertens*, 113 S.Ct. at 2071 (emphasis in original). This principle is "especially true with . . . an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests . . . ." *Id.*

In the CWA, Congress indeed enacted a complex regulatory scheme through which it sought to achieve its ultimate purpose. That regulatory regime envisions roles both for the federal government and for the states in achieving Congress' objective. *Arkansas*, 112 S.Ct. at 1054. Congress thus determined the division of authority that, in its judgment, would be most effective in "restoring and maintaining the . . . integrity of the Nation's waters." The role of a court interpreting provisions of the statute that effect that division is not to revise that allocation of responsibility, based on its own views of how best to achieve the purpose of the statute, but to give effect to the choice that Congress made and expressed in the language of section 401. *See Niagara Mohawk Power Corp.*, slip op. at 11. The expansive reading of the "appropriate requirement" clause of section 401(d) adopted in the decision below disregards the context in which the clause appears and fails to consider how section 401(d) functions within section 401 and in the overall context of the CWA.

2. *The court below misread the legislative history of section 401.*

The court below also purported to rely on the legislative history of section 401(d), stating that the inclusion of a reference to section 303 (the water quality standards provision) in subsection (a)(1) of section 401, in conjunction with its omission from subsection (d), must mean that the conditioning authority in the latter subsection was intended to extend beyond the scope of the certification authority under the former. Pet. App. 12a. This

argument is based on a fundamental misreading of the legislative history.

As enacted in 1972, neither subsection (a)(1) nor subsection (d) of section 401 included a reference to water quality standards or to section 303. Pub. L. No. 92-500, § 2, 86 Stat. 877. Subsection 401(a)(1) was amended to add a reference to section 303 in 1977. The Senate Report explained the purpose of the amendment as follows:

> The Congress intended in 1972 that State water quality standards would be imposed through section 301, and thus certification by the State would include consideration of the water quality standards. The failure to explicitly include reference to section 303 has led to confusion, however, as to whether certification of compliance with water quality standards was required. This amendment follows the original congressional intent and clarifies that.

S. Rep. No. 370, 95th Cong., 1st Sess. 72-73 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4397-98. To implement this change, Congress inserted "303" in the "phrase 301, 302, 306, or 307 of this Act" wherever those phrases appeared in section 401. Pub. L. No. 95-217, § 64, 91 Stat. 1599. This clarification modified subsection (a)(1) of section 401, but did not modify subsection (d), even though all four sections were referred to, because the listing is broken up by explanatory phrases. *See supra* n.7.

The court below erred, however, in reading some purpose into this apparent oversight. The conference committee explained that Congress intended no such distinction:

> It is understood that section 303 is required by the provisions of section 301. Thus, the inclusion of section 303 in section 401 while at the same time not including section 303 in other sections of the Act, where sections 301, 302, 306 and 307 are listed is in no way intended to imply that 303 is not included by reference to 301 in those other places of the Act. . . . *Section 303 is always included by reference where section 301 is listed.*

H.R. Conf. Rep. No. 95-830, 95th Cong., 1st Sess. 96 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4424, 4471 (emphasis added). No inference can properly be drawn from the omission of section 303 from subsection (d) of section 401, since that section was already included by reference due to the listing of section 301.

II. THE STATE COURT'S SWEEPING INTERPRETATION OF SECTION 401 OF THE CWA CONFLICTS WITH CONGRESS'S DELEGATION OF COMPREHENSIVE AUTHORITY OVER HYDROELECTRIC PROJECTS TO THE FERC TO PROMOTE THE BALANCED DEVELOPMENT OF WATER RESOURCES.

The Washington Supreme Court's expansive interpretation of the states' authority to condition water quality certifications on compliance with any requirement of state law "related to water quality" (Pet. App. 13a) would vest the states with final authority over the critical environmental issues associated with the development of hydroelectric facilities. Affording such broad authority to state agencies would, however, interfere with Congress's determination in the FPA that the Nation's water power resources should be developed in a comprehensive manner that balances the developmental benefits and environmental consequences of hydroelectric projects, subject to exclusive regulation by the FERC.

A. Congress Gave the FERC Plenary Authority To Regulate Hydroelectric Projects in Order To Promote the Balanced Development of Water Power Resources.

Under the FPA, the FERC is empowered to issue licenses for the development of hydroelectric projects. 16 U.S.C. § 797(e). Under Section 10, a license must be conditioned so that the project:

> will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, for the adequate protection, mitigation and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses.

16 U.S.C. § 803(a)(1).

This Court has recognized that the FPA from its very beginning was intended to consolidate and coordinate the regulation of hydropower projects under the control of a single federal agency in order to bring about the development of the hydroelectric potential of the Nation's water resources in a balanced manner. In *First Iowa Hydro-Elec. Coop. v. FPC*, the Court noted that the FPA "was the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, insofar as it was within the reach of the federal power to do so . . . ." 328 U.S. at 180. The Court explained that "Congress was concerned with overcoming the danger of divided authority so as to bring about the needed development of water power . . . ." *Id.* at 174. On this basis, the Court concluded that an applicant for a hydroelectric license need not comply with state permitting requirements. *Id.* at 166-67. The Court recently reaffirmed this assessment of the regulatory scheme by rejecting a state agency's attempt to impose on a hydropower project minimum streamflow conditions that were higher than the minimum streamflow conditions imposed by the FERC in its license. *California*, 495 U.S. at 496.

While Congress's purpose in the FPA was to promote the development of water power, it did not intend the environmental consequences of hydroelectric development to be ignored. To the contrary, this Court has recognized

that, as originally enacted, the FPA required that licensing decisions balance developmental and environmental concerns. *Udall v. Federal Power Commission*, 387 U.S. 428 (1967). The Court held such a broad inquiry to be part and parcel of the Commission's charge under the FPA to protect the public interest, which requires:

> an exploration of all issues relevant to the "public interest," including future power demand and supply, alternative sources of power, the public interest in preserving reaches of wild rivers and wilderness areas, the preservation of anadromous fish for commercial and recreational purposes, and the protection of wildlife.

Id. at 450.

In 1986 (after the enactment and most recent amendment of section 401 of the CWA), Congress enacted the Electric Consumers Protection Act ("ECPA"), Pub. L. No. 99-495, 100 Stat. 1243, primarily to reaffirm the duty of the FERC to balance all aspects of hydroelectric developments in its licensing decisions. Section 4(e) of the FPA was amended by the ECPA to require the FERC to:

> give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

16 U.S.C. § 797(e).[15] In addition, the ECPA amendments added section 10(j) to the FPA to require the FERC to solicit the recommendations of all interested state and federal agencies (referred to as "resource agencies") regarding the conditions to be included in a proj-

---

[15] The corresponding language in section 10(a)(1) of the FPA, quoted *supra*, was inserted by the ECPA.

ect's license, and to base the conditions that the FERC will impose on its licenses on its consideration of those recommendations. 16 U.S.C. § 803(j).

The ECPA thus confirmed the FPA's initial mandate by requiring the FERC to give "equal consideration" to environmental impact and other non-power concerns in its licensing decisions, while enhancing the opportunities for state resource agencies to participate in FERC proceedings implementing that responsibility. The ECPA nevertheless preserved the FERC's paramount authority over all aspects of hydroelectric development. Congress made clear that it intended to preserve the FERC's discretion to accept or reject the recommendations of state and federal resource agencies:

> The provision is intended to stress the expertise of these agencies and the need for FERC to rely on them. Section 10(j) does not give such agencies a veto nor does it give them mandatory authority.[16]

The FPA reflects Congress's desire to bring about the development of the Nation's water power resources in a manner that balances developmental and environmental considerations. To achieve this end, Congress gave paramount and exclusive authority over all aspects of hydroelectric authority to a federal agency and prohibited state regulation of federally licensed hydroelectric projects except to the extent that state authority was expressly preserved. This Court summarized both the nature of the FERC's authority under the FPA and the basis for the

[16] H.R. Conf. Rep. No. 99-934, 99th Cong., 2d Sess. 23 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2540. *See also U.S. Department of Interior v. FERC*, 952 F.2d 538, 545 (D.C. Cir. 1992) (rejecting contentions that Federal and State resource agencies could order FERC to conduct environmental studies as part of the agencies' recommendation authority under Section 10(j)); *State of California v. FERC*, 966 F.2d 1541, 1550 (9th Cir. 1992) ("'[E]qual consideration' does not dictate FERC's acceptance of the result proposed by the fish and wildlife agencies.").

prohibition of duplicative state regulation in *California v. FERC*:

> As Congress directed in FPA § 10(a), FERC set the conditions of the license after considering which requirements would best protect wildlife and ensure that the project would be economically feasible, and thus further power development. Allowing California to impose significantly higher minimum stream flow requirements would disturb and conflict with the balance embodied in that considered federal agency determination.

495 U.S. at 506-07.

B. The Washington Supreme Court's Interpretation of Section 401 of the CWA Conflicts With the Federal Regulatory Scheme of the FPA.

This Court has stated that a federal statute should, wherever possible, be interpreted so as to give effect to the provisions of other enactments touching on the same subject matter. *See Watt v. Alaska*, 451 U.S. 259, 266-67 (1981). The Washington Supreme Court failed to interpret section 401 of the CWA in a manner consistent with the requirements of the FPA. Rather, its interpretation of section 401 of the CWA conflicts with the fundamental aspects of the comprehensive regulatory scheme enacted in the FPA.

First, as explained above, the FPA requires that, in fashioning the conditions upon which a hydroelectric project will be permitted to go forward, the power and other developmental benefits of the project be balanced against the environmental consequences of its development. The decision below, in contrast, gives states the authority, and imposes on them the obligation,[17] to condition section 401

[17] The language of section 401(d) is mandatory, stating that section 401 certifications "shall set forth" conditions necessary to ensure compliance with the requirements that fall within the scope of the provision.

certifications to ensure compliance with all requirements of state law that are in any way related to water quality. Pet. App. 13a. Considerations related to water quality, as reflected in state laws and regulations that are not subject to federal oversight, are thus removed from the balancing required by sections 4(e) and 10(a) of the FPA and are elevated to paramount importance. Moreover, states have taken an expansive view of those provisions of state law that they believe are somehow "related to water quality."[18] The expansive reading of section 401 adopted by the court below effectively permits states to duplicate the comprehensive review undertaken by the FERC, in a manner that exempts environmental considerations from the balancing mandated under the FPA.[19]

Second, the Washington Supreme Court's interpretation of section 401 conflicts with the Congressional determination in the FPA to vest final authority in a federal agency, the FERC, to balance all interests affected by hydroelectric development. Not only would the court below exempt environmental considerations from the balancing required by the FPA, it would make it the responsibility of the state certifying agency to determine how to apply the state environmental requirements to the federally li-

[18] In New York, for example, the NYSDEC has taken the position that state statutes governing dam repair and dam safety, as well as those relating to the recreational and municipal use of water, and the protection, preservation and propagation of fish and wildlife are related to water quality and therefore, under the interpretation of section 401 adopted by the court below, must be enforced in a section 401 certification regardless of their impact on the economic viability of a hydroelectric project. Gerstman, *supra* n.1.

[19] In New York, the NYSDEC has taken the view that the "appropriate requirement" clause of section 401(d) authorizes it to conduct a full scale review of a hydroelectric project under the State Environmental Quality Review Act and to impose conditions on a certification as necessary to mitigate any adverse environmental impacts of the project, regardless of the FERC's view of the appropriateness of those mitigation measures. *Id.*

censed project. This substitution of state authority for federal authority would subvert the intent of Congress. As this Court has recognized, "[t]he detailed provisions of the [FPA] providing for the federal plan of regulation leave no room or need for conflicting state controls." *First Iowa*, 328 U.S. at 181. *See also California*, 495 U.S. at 506-07. The Court explained:

> Such a veto power easily could destroy the effectiveness of the federal act. It would subordinate to the control of the State the "comprehensive" planning which the Act provides shall depend on the judgment of the Federal Power Commission or other representatives of the Federal Government.

First Iowa, 328 U.S. at 164.

The Washington Supreme Court's reading of section 401 amounts to a determination that Congress intended in that section to repeal the FPA's grant of exclusive and preeminent regulatory authority over hydroelectric development to the FERC. Not only are repeals by implication generally disfavored, *see Watt*, 451 U.S. at 266-67, but the development of the CWA and the FPA make it clear that none was intended here. As explained above, when Congress enacted the ECPA (over a decade after the enactment of the section 401), it required the FERC to consider state agencies' recommendations with respect to hydroelectric license conditions. Congress did not, however, require the FERC to accept state agencies' recommendations. Congress certainly did not give the states the authority themselves to establish the licensing conditions appropriate to protect fish and wildlife. This effort to preserve the FERC's final authority would have been pointless if the states already had the broad powers that the Washington Supreme Court found under section 401 of the CWA. As this Court has recognized:

> By directing FERC to consider the recommendations of state wildlife and other regulatory agencies while providing FERC with *final authority* to establish li-

> cense conditions (including those with terms inconsistent with the States' recommendations), Congress has amended the FPA *to elaborate and reaffirm First Iowa's understanding that the FPA establishes a broad and paramount federal regulatory role.*[20]

The court below made no attempt to read the states' authority under section 401 in a manner that avoids undermining the regulatory scheme of the FPA. The unsupported interpretation of section 401 adopted by the Washington Supreme Court would "fundamentally . . . restructure a highly complex and long enduring regulatory regime, implicating considerable reliance interests of licensees and other participants in the regulatory process." *California*, 495 U.S. at 500. As explained above, a construction that preserves the authority of the FERC, while affording a meaningful role to state water pollution control efforts was available and, indeed, is compelled by the text and structure of the CWA. Section 401 should be read to empower states to condition water quality certifications as necessary to ensure compliance with the listed provisions of the CWA, including state-promulgated water quality standards, and with state restrictions on the addition of pollutants to navigable waters. Outside of the sphere of authority expressly reserved to the states under section 401, the Congressional determination that the FERC determine how best to balance all interests affected by hydroelectric devlopments should be given effect.

---

[20] *California*, 495 U.S. at 499 (emphasis added). *See also Sayles Hydro Associates v. Maughan*, 985 F.2d 451, 456 (9th Cir. 1993) ("There would be no point in Congress requiring the federal agency to consider the state agency recommendations on environmental matters and make its own decisions about which to accept, if the state agencies had the power to impose the requirements themselves.").

CONCLUSION

For the reasons stated above, the decision of the Washington Supreme Court should be reversed.

Respectfully submitted,

Of Counsel:

PAUL J. KALETA
BRIAN K. BILLINSON
NIAGARA MOHAWK POWER CORPORATION
300 Erie Boulevard West
Syracuse, New York 13202
(315) 428-6187

TIMOTHY P. SHEEHAN
HISCOCK & BARCLAY
One KeyCorp Plaza, Suite 1100
30 South Pearl Street
Albany, New York 12207
(518) 434-2163

EDWARD BERLIN
Counsel of Record
KENNETH G. JAFFE
JOEL DEJESUS
SWIDLER & BERLIN, CHARTERED
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7500